(3)

No. 09-461

Supreme Court, U.S.
FILED
JAN 20 2010
OFFICE OF THE CLERK

In The Supreme Court of the United States

STEPHEN MICHAEL WEST,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT E. COOPER, JR.
Attorney General & Reporter
STATE OF TENNESSEE

MICHAEL E. MOORE
Solicitor General

JENNIFER L. SMITH
Associate Deputy Attorney General
Counsel of Record
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-3487

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE
QUESTION PRESENTED

Whether the court of appeals properly denied federal habeas relief, in light of evidence developed in state post-conviction proceedings, on petitioner's claim that trial counsel was constitutionally ineffective for failing to investigate and present evidence of petitioner's childhood abuse during his capital sentencing proceeding.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
I. Procedural History	3
II. Facts Relevant to the Petition	5
III. The Opinions Below	6
ARGUMENT	10
THE COURT OF APPEALS PROPERLY CONFINED ITS ANALYSIS OF PETITIONER'S INEFFECTIVE ASSISTANCE CLAIM TO EVIDENCE DEVELOPED IN STATE POST-CONVICTION PROCEEDINGS AND CORRECTLY CONCLUDED THAT, IN LIGHT OF THAT EVIDENCE, PETITIONER FAILED TO SHOW THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL SENTENCING HEARING	10
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Virginia, 536 U.S. 304 (2002) 16

Brewer v. Quarterman, 550 U.S. 286 (2007).....16

Burger v. Kemp, 483 U.S. 775 (1987).....14, 17, 18

McMann v. Richardson, 397 U.S. 759 (1970).....12

Rompilla v. Beard, 545 U.S. 374 (2005) 15

Smith v. Jago, 888 F.2d 399 (6th Cir. 1989) 12

Strickland v. Washington, 466 U.S. 668 (1984) ...*passim*

STATUTES AND RULES

28 U.S.C. § 2254(a) 1, 11

28 U.S.C. § 2254(d)(2).....2, 11

28 U.S.C. § 2254(e)(2).....2, 6, 7, 10, 11

Tenn. Code Ann. § 39-2-203(i)(5), (6) and (7) (1982).....3

Tenn. R. App. P. 11.....4

OPINION BELOW

The opinion of the court of appeals that is the subject of this petition is published at 550 F.3d 542. (Pet. App. 1a). The memorandum opinion and order of the district court relevant to West's claim (Pet. App. 59a, 364a) are unreported.

STATEMENT OF JURISDICTION

The judgment and opinion of the court of appeals were entered on December 18, 2008. (Pet. App. 1a). The court denied rehearing on May 20, 2009. (Pet. App. 428a). By order entered July 22, 2009, Justice Stevens extended the time for filing a petition for writ of certiorari from August 18, 2009, until October 17, 2009. (09A87). Petitioner filed a certiorari petition on October 19, 2009. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254, which governs the remedy of federal habeas corpus for applicants in state custody, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in

violation of the Constitution or laws or treaties of the United States.

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

* * *

(e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) The claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

I. Procedural History

On March 25, 1987, a Union County, Tennessee, jury convicted the petitioner, Stephen West, of the first-degree premeditated murders of Wanda Romines and her daughter, Sheila Romines, aggravated kidnapping of both victims, and aggravated rape of Sheila Romines. Finding three statutory aggravating circumstances applicable to each of the murders – that the murders were especially heinous, atrocious or cruel; that they were committed to avoid arrest or prosecution; and that they were committed while the defendant was engaged in committing first degree murder, rape or kidnapping – the jury sentenced petitioner to death. *See* Tenn. Code Ann. § 39-2-203(i)(5), (6) and (7) (1982) (repealed 1989). The Tennessee Supreme Court affirmed the judgment. *State v. West*, 767 S.W.2d 387 (Tenn. 1989), *cert. denied*, 497 U.S. 1010 (1990).

West filed a state petition for post-conviction relief in 1990. Following an evidentiary hearing, the

trial court denied relief. The Tennessee Court of Criminal Appeals affirmed the trial court's judgment. *West v. State*, No. 03C01-9708-CR-00321, 1998 WL 309090 (Tenn. Crim. App. June 12, 1998). (Pet. App. 404a). West subsequently filed an application for permission to appeal to the Tennessee Supreme Court pursuant to Tenn. R. App. P. 11. The Tennessee Supreme Court granted West's application on a single issue and, on January 5, 1998, affirmed the judgment of the Court of Criminal Appeals denying the post-conviction petition. *State v. West*, 19 S.W.3d 753 (Tenn. 2000).

On February 20, 2001, West filed a motion for appointment of counsel and for stay of execution in the United States District Court for the Middle District of Tennessee. *West v. Bell*, No. 3:01-cv-00174 (M.D. Tenn.) (J. Campbell). The district court appointed counsel and transferred the case to the Eastern District of Tennessee, which granted a stay of execution on February 23, 2001. *West v. Bell*, No. 3:01-cv-00174 (M.D. Tenn. Feb. 21, 2001). West filed a petition for writ of habeas corpus on June 7, 2001, and an amended petition on February 25, 2002. On September 30, 2004, the district court entered a memorandum opinion and order granting respondent's motion for summary judgment. (Pet. App. 59a). The court altered its judgment, in part, on December 10, 2004. (Pet. App. 364a). West appealed.

On December 18, 2008, the United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment. *West v. Bell*, 550 F.3d 542 (6th Cir.

2008) (reh. denied). (Pet. App. 1a). That decision is the subject of the instant petition.

II. Facts Relevant to the Petition

A summary of the evidence presented at petitioner's trial appears in the opinion of the Tennessee Supreme Court on direct appeal. *State v. West*, 767 S.W.2d 387, 389-92 (Tenn. 1989).

In addition, the district court summarized the evidence at petitioner's trial and sentencing hearing in its memorandum opinion. (Pet. App. 61a-78a).

In 1990, West filed a petition for post-conviction relief in the state courts alleging, among other things, ineffective assistance of counsel during the sentencing phase of his trial. Following evidentiary proceedings in September and October 1996, the post-conviction court denied relief. A summary of the evidence presented in that proceeding is included in the opinion of the Tennessee Court of Criminal Appeals and in the district court's memorandum opinion. (Pet. App. 79a-109a, 406a-419a). The post-conviction court denied relief, concluding that petitioner had failed to carry his burden with respect to the allegations, particularly in light of "conflicting testimony regarding mitigation evidence that trial counsel failed to present." (Pet. App. 422a). The Tennessee Court of Criminal Appeals affirmed, concluding that, "in light of this conflicting evidence, the petitioner did not meet his burden with respect to the allegation of ineffective counsel at the sentencing phase." The court further concluded that petitioner "failed to show

how he was prejudiced by any acts or omissions of counsel." (Pet. App. 422a). The Tennessee Supreme Court granted review on a single issue that was unrelated to the ineffective assistance claim and did not address the ineffective assistance issue in its opinion. *State v. West*, 19 S.W.3d 753 (Tenn. 2000).

III. The Opinions Below

The district court denied West's petition for habeas corpus relief. In reviewing the merits determination by the Tennessee courts on petitioner's ineffective-assistance claim, the district court observed that both the state post-conviction and appellate courts agreed that there was conflicting evidence "regarding the *existence* of mitigating evidence that trial counsel failed to present and that, in light of the conflicting evidence, Petitioner failed to meet his burden with respect to the allegation of ineffective assistance of counsel at the sentencing phase." (Pet. App. 173a) (emphasis added). The district court further observed that petitioner submitted numerous affidavits and evidence in the federal habeas proceeding that was not presented to the Tennessee state courts, yet "offered no explanation as to why this new evidence was not presented to the state courts other than a general statement" about the lack of necessary resources in state post-conviction proceedings (a claim the district court found dubious). (Pet. App. 177a). The court specifically found that petitioner failed to carry his burden under 28 U.S.C. § 2254(e)(2) to allow the federal court to consider the new evidence, specifically that "[p]etitioner has failed to

demonstrate cause, unattributable to himself or his trial counsel, for failing to present these witnesses and this evidence in state court." (Pet. App. 181a).

> Because 28 U.S.C. § 2254(e)(2) is an express limitation on the district court's jurisdiction, this Court is restricted to the extent that it may only consider the state court's determination of the facts in light of the evidence presented in the state court proceeding. Additionally, 28 U.S.C. § 2254(e)(2) is an express limitation on the Court in deciding whether to hold an evidentiary hearing. Consequently, Petitioner's failure to develop the facts of this new evidence in the state court proceedings and his failure to demonstrate the failure was not attributable to him or his trial counsel prevents this Court from considering the new evidence to support this claim because the criteria which would allow this Court to consider the new evidence has not been satisfied. Therefore, the Court will only consider the evidence fairly presented to the state court when evaluating the state court's decision.

(Pet. App. 182a). As to petitioner's allegations of childhood abuse, the district court further observed:

> [A]lthough there are allegations that Petitioner was abused as a child, *there is no substantially reliable evidence to support this allegation*. First, the fact that the claim of abuse was not raised until after Petitioner received a death sentence is suspect. Second, Petitioner has not made a credible

> showing that he actually suffered any abuse. Petitioner's strongest proof of abuse is testimony by his oldest sister, Debra West. However, *her testimony of alleged abuse of Petitioner substantially contradicts the testimony she presented during the sentencing hearing.*

(Pet. App. 185a) (emphasis added).

The district court concluded that the state courts' determination of petitioner's ineffective-assistance claim was "based on a reasonable determination of the facts in light of the evidence presented in the state court proceeding, and that the decision was not contrary to *Strickland*." (Pet. App. 188a).

The court of appeals affirmed. Although the appellate court first determined that the post-conviction court (at the trial court level) had articulated an incorrect standard for prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), the court concluded that the state-court record "demonstrates that West's counsel was not so ineffective as to constitute a denial of his constitutional rights." (Pet. App. 20a). After citing the specific deficiencies asserted by the petitioner in his federal habeas appeal, the court ruled that, "[w]e are not convinced . . . that all of these are actually errors, let alone errors that rise to the level of ineffective assistance." (Pet. App. 21a).

Specifically as to petitioner's allegations of childhood abuse, the court observed that the proof presented in state proceedings raised serious questions as to whether any such abuse occurred at all.

> In the case at hand, the most significant alleged error – the failure to adequately investigate West's past abuse – is also the most contested. Debbie West claims she informed [trial counsel] about the abuse, but the attorneys strongly deny that. The two psychologists, Engum and Bursten, disagree over whether West's evaluations contain evidence of abuse; and Bursten testified that West specifically denied being abused.

(Pet. App. 23a).

The court of appeals outlined trial counsel's investigative efforts, including multiple interviews with family members, obtaining numerous historical records, including school and military records, and counsel's investigation into West's mental state. Citing *United States v. Cronic*, 466 U.S. 648 (1984), the court correctly observed that the high level of deference afforded counsel's performance means that, "we address not what is *prudent* or *appropriate*, but only what is *constitutionally compelled*." (Pet. App. 22a) (emphasis added). Finally, the court of appeals concluded that, even if West could prove that his counsel was ineffective, "[g]iven the strength of the evidence against West presented at trial and the weakness of the mitigating evidence presented during [state] post-conviction proceedings, we cannot conclude that there was a reasonable probability that the jury would have chosen to spare West's life." (Pet. App. 26a).

ARGUMENT

THE COURT OF APPEALS PROPERLY CONFINED ITS ANALYSIS OF PETITIONER'S INEFFECTIVE ASSISTANCE CLAIM TO EVIDENCE DEVELOPED IN STATE POST-CONVICTION PROCEEDINGS AND CORRECTLY CONCLUDED THAT, IN LIGHT OF THAT EVIDENCE, PETITIONER FAILED TO SHOW THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL SENTENCING HEARING.

Petitioner argues that certiorari review is warranted because the court of appeals failed to consider evidence – presented for the first time in federal habeas proceedings – showing that he suffered severe childhood abuse. He further contends that the court of appeals "trivialized" the significance of the mitigation evidence in question. His petition should be denied. During state post-conviction proceedings, petitioner had a full and fair opportunity to develop the factual basis of his ineffective-assistance claim. But the proof presented to the state courts was contradictory and failed to show with any degree of reliability that petitioner suffered the severe childhood abuse he now asserts, let alone that counsel's performance fell below the level of constitutional effectiveness. Consistent with 28 U.S.C. § 2254(e)(2), both the federal district court and court of appeals refused to consider evidence that had not been fairly presented to the state courts. The district court observed that much of the evidence asserted to

support West's abuse allegation was never fairly presented to the state courts and specifically found that petitioner failed to carry his burden under § 2254(e)(2) to allow the federal court to consider the new evidence. "Because § 2254(d)(2) is an express limitation on the district court's jurisdiction, this Court . . . may only consider the state court's determination of the facts in light of the evidence presented in the state court proceeding." (Pet. App. 181a). The district court correctly perceived its jurisdictional limitations, and its rejection of West's "new evidence" as consistent with its statutory limitations.[1]

Although the court of appeals concluded that the state post-conviction court had recited an incorrect standard for prejudice under *Strickland*, it correctly observed that habeas relief was warranted only if West "is in custody in violation of the constitution or laws or treaties of the United States." 28 U.S.C.

---

[1] The district court made specific findings as to each item in question, concluding that West had failed to carry his burden of demonstrating either that he was not at fault in failing to present the evidence in state court proceedings (*e.g.*, affidavits of Debra Harless and Vestor West, West's military form DD-214, the affidavit of Patty Rutherford, and reports of Dr. Coleman and Dr. Dudley) or that a fundamental miscarriage of justice would result from the Court failing to consider the evidence (*e.g.*, affidavit of Keith Caruso, M.D., records from Community Hospital, and an affidavit from Karen West Bryant). The district court further explained the deficiencies in West's case in its December 10, 2004, order supplementing its original memorandum order and judgment. (Pet. App. 376a).

§ 2254(a). To warrant relief on a claim of ineffective assistance of counsel, a criminal defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). The proper standard for attorney performance is that of "reasonably effective assistance," *Strickland*, 466 U.S. at 687, and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Id.*, 466 U.S. at 689. Accordingly, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable effective assistance." *Id.*

In addition, a defendant claiming ineffective assistance must affirmatively prove prejudice, and the appropriate test for such prejudice is whether the defendant has shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* Even if professionally unreasonable, an error by counsel does not warrant setting aside a criminal conviction if it had no effect on the final judgment. *Smith v. Jago*, 888 F.2d 399, 404-05 (6th Cir. 1989) (citing *Strickland*, 466 U.S. at 691). "When a [petitioner] challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and

mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

Here, the court of appeals properly recognized the high level of deference accorded defense counsel's decisions under *Strickland,* coupled with the fact that many of West's allegations concerning counsel's performance were weakened by conflicting testimony at the state post-conviction hearing, inconsistencies in the statements and opinions of West's own witnesses, and West's own failure to relate any instance of childhood abuse to either trial counsel or his mental health expert prior to trial.

> In the case at hand, the most significant alleged error – the failure to adequately investigate West's past abuse – is also the most contested. Debbie West [petitioner's older sister] claims she informed [trial counsel] about the abuse, but the attorneys strongly deny that. The two psychologists, Engum and Bursten, disagree over whether West's evaluations contain evidence of abuse; and Bursten testified that West specifically denied being abused.

(Pet. App. 23a). Indeed, after examining the specific allegations of deficiency in view of counsel's actual performance at trial, the court of appeals observed, "We are not convinced . . . that all of these are actually errors, let alone errors that rise to the level of ineffective assistance of counsel." (Pet. App. 21a).

The court's ruling is entirely consistent with *Strickland*, which instructs that "[j]udicial scrutiny of

counsel's performance must be highly deferential," and a court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Moreover, a defendant's role in influencing counsel's decisions must be taken into account. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 691. As this Court stated in *Burger v. Kemp*, when considering claims of ineffective assistance of counsel, the issue is "not what is prudent or appropriate, but only what is constitutionally compelled." 483 U.S. 775, 794 (1987). "We have decided that 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" *Id.* at 794 (citing *Strickland*, 466 U.S. at 690-691). Moreover, where, as here, neither West nor any family member informed trial counsel of alleged childhood abuse during any of the "multiple" pretrial interviews, where West himself specifically denied abuse during a pretrial mental health evaluation by Dr. Ben Bursten, and where none of the "numerous historical records" counsel examined nor any material submitted in federal habeas proceedings substantiated West's claim of abuse,[2] counsel cannot be faulted

---

[2] The district court specifically found that the record submitted in federal habeas proceedings purporting to be from Community Hospital "bears no indicia to substantiate [the abuse] claim." (Pet. App. 178a). In addition, the court found that it "has

(Continued on following page)

for failing to discover that information, if it existed at all.

The court of appeals' opinion reflects a faithful application of *Strickland*'s performance standard in light of counsel's actual performance at West's trial with due consideration to information gained by counsel in the course of reasonable investigative efforts, including "multiple" interviews of family members, examination of "numerous historical records," including school and military records, interviews of West himself, and an independent psychological evaluation, which revealed no evidence of the personality disorder diagnosed by West's mental health expert 9½ years after his trial and conviction. (Pet. App. 23a). Counsel's performance in this case is thus easily distinguished from the situation in *Rompilla v. Beard*, 545 U.S. 374, 389 (2005), in which this Court found counsel deficient in failing to review available court records concerning a prior felony conviction.

Further, petitioner misreads the court of appeals' decision as "trivializing" the mitigation evidence in

---

not been directed to any medical records to substantiate Petitioner's allegations of physical abuse or medical records to support his allegation that the abuse resulted in several surgeries." (Pet. App. 176a). In its ruling on West's motion to alter or amend, the district court further observed that although petitioner had attached certain medical records (some of which were illegible) to his motion to alter or amend to support his abuse claim, he failed to "point out which record contains evidence of abuse, and the Court has found no such record." (Pet. App. 385a).

question. The decision in this case turned primarily on the panel's assessment that the evidence presented in petitioner's state post-conviction proceedings failed to show that trial counsel's performance was constitutionally deficient. In the alternative, the Court held that "even if West could prove that his counsel was ineffective for all of the reasons he cited, he has not shown that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (Pet. App. 25a). The court's admitted speculation, in *dicta,* concerning the likelihood that alleged evidence of childhood abuse may have cut against West in the jury's final analysis does not undermine its prejudice determination or trivialize the evidence in question.[3] Rather, the court of appeals properly recognized that the weakness of any such evidence during state post-conviction proceedings rendered it unnecessary to engage in such speculation, because the available evidence did not give rise to a "reasonable probability" that the proceeding would have been different. "Given the strength of the evidence against West presented at trial and the weakness of the mitigating evidence that West presented during the post-conviction proceedings, we cannot conclude that

---

[3] This Court has itself recognized that certain mitigating evidence has the potential to act as a two-edged sword in a jury's sentencing deliberations. *See, e.g., Brewer v. Quarterman*, 550 U.S. 286 (2007); *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002).

there was reasonable probability that the jury would have chosen to spare West's life." (Pet. App. 26a).

In *Burger,* the Court noted that a Acapital sentencing proceeding 'is sufficiently like a trial in its adversarial format and in the existence of standards for decision' that counsel's role in the two proceedings is comparable – it is 'to ensure that the adversarial testing process works to produce a just result under the standards governing decision.'" 483 U.S. at 788 (citing *Strickland*, 466 U.S. at 686, 687). Accordingly, the Court stated that when a habeas petitioner claims that his trial counsel failed to develop and present mitigating evidence, the court must determine whether counsel's "performance in evaluating the mitigating evidence available to him, and deciding not to pursue further mitigating evidence, undermines the confidence in the adversarial process" of the case. *Id.* at 788-789. The Court further noted that the relevancy of the mitigating evidence that might have been presented, "and the trial court's corresponding duty to allow its consideration have no bearing on the quite distinct question" of "whether counsel acted reasonably in deciding not to introduce the evidence out of apprehension that it would contribute little to his client's chances of obtaining a life sentence while revealing possibly damaging details about his past and allowing foreseeably devastating cross-examination." *Id.* at 790 n.7.

In *Burger*, the petitioner claimed that his trial counsel had not made an adequate investigation of potentially mitigating evidence. At an evidentiary

hearing, the petitioner presented evidence that could have been presented in mitigation. The hearing revealed that his trial counsel had interviewed his mother, friends, acquaintances, and a psychologist who had examined him. The hearing also revealed that his trial counsel had reviewed psychological reports. *Id.* at 789-92. The federal district court denied relief. After reviewing the evidence presented at the evidentiary hearing, this Court affirmed. The Court held that Burger's trial counsel was not ineffective, because he had interviewed a sufficient number of potential witnesses under the circumstances and had a reasonable strategic basis for not presenting some of the potentially mitigating evidence he had uncovered through his investigation. *Id.* at 794-95.

Here, petitioner's counsel did make an investigation. Counsel interviewed petitioner's family on numerous occasions and obtained a mental health examination of petitioner. They also spent many hours with the petitioner impressing upon him the seriousness of his case and exploring his background looking for a defense. Based upon their investigation, there was no evidence from which to conclude that petitioner had been physically abused as a child or that further investigation was warranted. Trial counsel testified in state court proceedings that he discussed the petitioner's background with his parents and at least one sister. He stated that the petitioner never mentioned any physical abuse and that none of the family members had ever raised the issue.

Trial counsel also arranged for petitioner to be evaluated by a psychiatrist, who testified that, at the time he evaluated the petitioner, there was no reason to believe that the petitioner had been abused as a child. Indeed, petitioner specifically denied any such abuse.

Under these circumstances, and in light of the evidence properly developed in the state court proceedings, the court of appeals correctly concluded that petitioner failed to demonstrate that he received constitutionally ineffective assistance; thus, review by this Court is unwarranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General & Reporter
STATE OF TENNESSEE

MICHAEL E. MOORE
Solicitor General

JENNIFER L. SMITH
Associate Deputy Attorney General
Counsel of Record
P.O. Box 20207
Nashville, Tennessee 37202-0207
Phone: (615) 741-3487
Fax: (615) 532-7791

Counsel for Respondent